No. 94-590

SUPREME COURT, U.S.
FILED
JAN 12 1995
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

VERNONIA SCHOOL DISTRICT 47J,
Petitioner,
v.
WAYNE and JUDY ACTON,
guardians ad litem for JAMES ACTON,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL CONFERENCE OF STATE LEGISLATURES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Vernonia School District's random drug testing program for student athletes is reasonable under the Fourth Amendment.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. Public education is "perhaps the most important function of state and local governments." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954); *see also Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). The ability of States and local school districts to implement policies which will enable them to appropriately carry out their educational mission

and to preserve the health and safety of their students is therefore of central importance to *amici*.

Drug abuse is on the rise in our nation's schools, presenting risks to the health and education of students. Results of a study released last month indicate that illicit drug use is increasing among secondary school students. *See* Michael Janofsky, "Drug Use Rising Among Teen-Agers, Study Says," *New York Times*, Dec. 13, 1994 at p. A1 (reporting results of nationwide annual survey conducted by the University of Michigan's Institute for Social Research). Of particular concern is heightened drug use among middle school students. For example, the study found that "eighth graders were using marijuana at a higher rate than in prior years," with 13% reporting usage within the past year, up from 7.2% in 1992. *Id.; see* 1 Lloyd Johnston *et al., National Survey Results on Drug Use from Monitoring the Future Study, 1975-1993* 24 (National Institutes of Health 1994) (by the end of eighth grade, 32% of American students have tried an illicit drug; 47% have done so by the end of twelfth grade).

The court of appeals' ruling strikes down a reasoned program implemented as a last resort, after careful deliberation and consultation with parents, *see* Pet. App. 84a-88a, by a school district in which substance abuse had become so pervasive as to seriously compromise the schools' educational mission and the District's ability to protect student athletes from injury, *see id.* at 79a-84a. Given the tremendous destructive potential of drugs and alcohol, this limitation on schools' authority to meaningfully address such a severe crisis is of significant concern.

Because of the importance of this issue to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of this case.[1]

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[1] The parties have consented to the filing of this brief *amici curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

STATEMENT

Amici adopt petitioner's statement of the case.

SUMMARY OF ARGUMENT

Because the Fourth Amendment prohibits only unreasonable searches, "the permissibility of a particular practice 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989) (citation omitted). This reasonableness inquiry is fact-intensive and requires careful consideration of the circumstances and context of a particular search. *See, e.g., New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985). An examination of the facts of this case demonstrates that the intrusion occasioned by the Vernonia drug testing program was far outweighed by the School District's compelling interests in restoring sufficient discipline to enable education to take place, and in protecting the health and safety of its students.

1. As the Court has observed, "[s]ome modicum of discipline and order is essential if the educational function is to be performed." *Goss v. Lopez*, 419 U.S. 565, 580 (1975). Hence, "the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503, 507 (1969). In the Vernonia schools, widespread and flagrant drug abuse led to a complete breakdown of discipline. *See* Pet. App. 80a-87a. The School District clearly had a compelling interest in restoring an environment in which learning could take place.

The School District also has a compelling interest in protecting the health and safety of its students. Schools have long served a health mission in the community, and are routinely involved in providing preventive care to

schoolchildren. Given this role, the schools' compelling interest in combatting drug use, "one of the greatest problems affecting the health and welfare of our population," *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668 (1989), is beyond question. This interest is particularly acute with respect to student athletes, whose drug use presents unique health hazards, as well as the potential for serious injury. *See, e.g.*, J.A. 69-70, 72.

The School District's drug testing program was extremely effective in turning back the epidemic of drug abuse in the Vernonia schools and achieving these compelling interests. *See* Pet. App. 34a; J.A. 43. Moreover, given the District's lack of success with numerous alternatives, it appears that no other approach could have been as effective. While a measure need not be the "least intrusive" alternative to be valid under the Fourth Amendment, the absence of other alternatives capable of achieving the District's compelling interests weighs heavily in favor of the program's reasonableness.

2. While "[t]he interference with individual privacy that results from the collection of a urine sample for subsequent chemical analysis could be substantial in some circumstances," *Von Raab*, 489 U.S. at 671, a number of factors present in this case serve to decrease the level of intrusion. The testing program was narrowly targeted at a single extracurricular activity in which drug use and discipline problems were prevalent, the risks associated with drug use were at their height, unique incentives to use drugs existed, and changes in behavior could be expected to have the largest effect on the student body as a whole. *See, e.g.*, Pet. App. 117a.

The narrow tailoring of the testing program to interscholastic athletics is also significant given the fact that student athletes are already subject to numerous rules and regulations governing their behavior, including the requirement that they submit to a physical examination which includes providing a urine sample. *See* Pet. App. 94a &

n.2. The nonpunitive nature of the consequences of failing or refusing to take a drug test further reduce the intrusion. Positive test results "are not disclosed to criminal authorities and may not be used as the basis for school disciplinary proceedings such as suspension or expulsions." Pet. App. 121a-22a.

3. When the compelling governmental interests achieved by the testing program are balanced against the intrusion which the testing requires, it is clear that the program is not unreasonable under the Fourth Amendment. The court of appeals' contrary conclusion is largely based on its erroneous view that suspicionless testing is justified only where the risk of a dramatic, discrete, mass disaster is presented—"some additional horrible element, some terrible threat to safety . . . some shooting, some explosion, some crash of train, truck, or aircraft, or some breach of top secret national security." Pet. App. 58a.

Not only does this approach discount the fact that very serious injury and death can result from drug use by student athletes, it also fails to take into account the fact that the probability as well as the severity of a given harm is relevant to the reasonableness inquiry. In this case, the disaster—the inability of the District to educate its students and protect them from injury—was already well underway when the District took action.

ARGUMENT

VERNONIA'S SUSPICIONLESS DRUG TESTING PROGRAM IS REASONABLE UNDER THE FOURTH AMENDMENT

The Fourth Amendment prohibits only "unreasonable searches and seizures." U.S. Const. amend. IV; *see Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 618-19 (1989). In assessing reasonableness under the Fourth Amendment, the Court has used a balancing approach whereby "the permissibility of a particular practice 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" *Id.* at 619 (quoting *Delaware v. Prouse*, 440 U.S. 648, 654 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976)).[2] Because "what is reasonable depends on the context within which a search takes place," *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985), the Court has followed "the longstanding principle that neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance." *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989).[3]

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[2] *See also New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) ("The determination of the standard of reasonableness governing any specific class of searches requires 'balancing the need to search against the invasion which the search entails.'") (quoting *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967)); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 681 (1989) (Scalia, J., dissenting) (in determining whether a particular search is reasonable, "the answer depends largely upon the social necessity that prompts the search").

[3] It is clear that none of those elements is required here. Because the testing is conducted in a school setting, neither a warrant nor probable cause is required. *See T.L.O.*, 469 U.S. at 340-41. Moreover, respondents concede, as they must, that individualized suspicion is not a necessary element for finding a school-based search reasonable under the Fourth Amendment. *See* Opp. 44.

The Court's cases establish that individualized suspicion is not necessary for reasonableness "where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement," *Von Raab*, 489 U.S. at 665-66, as where there is a compelling need to discover or prevent "latent or hidden conditions." *Id.* at 668; *see also Skinner*, 489 U.S. at 624. Vernonia's drug testing plainly serves special governmental needs unrelated to law enforcement. Test results are not turned over to law enforcement authorities, Pet. App. 121a; instead, the program is designed to deter and treat drug use among student athletes. Moreover, drug use and impairment is a "latent or hidden condition[]" which makes a requirement of individualized suspicion impracticable. *See* pp. 15-16, *infra* (discussing inability to detect drug impairment among students).

The inquiry into reasonableness is, therefore, a fact-intensive one, the outcome of which turns on a particularized assessment of the circumstances surrounding, and interests implicated by, a given search. An examination of the facts surrounding the Vernonia drug testing program demonstrates that the intrusion occasioned by the program was clearly outweighed by the School District's compelling interest in turning back an epidemic of substance abuse which had drastically compromised its educational mission, and had resulted in actual and potential injuries and health hazards to its students.

A. The Vernonia Testing Program Serves Compelling Governmental Interests

The School District's testing program serves two compelling governmental interests, either of which would alone be sufficient to outweigh the intrusion occasioned by the test: first, the restoration of discipline sufficient to enable the District to perform its educational mission; and second, the amelioration of a dangerous situation that was threatening the health of its students and the safety of its athletes.[4]

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[4] *Amici* agree with petitioner that, in light of *T.L.O.*, it is questionable whether a compelling governmental interest is required for reasonableness, rather than merely a substantial governmental interest. *See* Pet. 38; *id.* at 35-36. That question need not be resolved in this case, however, since the governmental interests at issue here are plainly compelling ones.

1. *The School District Has A Compelling Interest In Maintaining Sufficient Discipline To Fulfill Its Educational Mission*

Because of its pervasive impact on the quality of life and the well-being of the citizenry, "education is perhaps the most important function of state and local governments." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). Clearly, States and local school districts have a compelling interest in meaningfully carrying out that function. *See T.L.O.*, 469 U.S. at 350 (Powell, J., concurring). As the Court has observed, the maintenance of "[s]ome modicum of discipline and order is essential if the educational function is to be performed." *Goss v. Lopez*, 419 U.S. 565, 580 (1975). Justice Powell made a similar observation in *T.L.O.*:

> The primary duty of school officials and teachers, as the Court states, is the education and training of young people. A State has a compelling interest in assuring that the schools meet this responsibility. Without first establishing discipline and maintaining order, teachers cannot begin to educate their students.

469 U.S. at 350 (Powell, J., concurring).[5]

Thus, "the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States

[5] Justice Powell elsewhere elaborated on the importance of discipline to the educational function of the school:

> Education in any meaningful sense includes the inculcation of an understanding in each pupil of the necessity of rules and obedience thereto. This understanding is no less important than learning to read and write. One who does not comprehend the meaning and necessity of discipline is handicapped not merely in his education but throughout his subsequent life. In an age when the home and church play a diminishing role in shaping the character and value judgments of the young, a heavier responsibility falls upon the schools.

Goss, 419 U.S. at 593 (Powell, J., dissenting); *see also Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503, 524 (1969) (Black, J., dissenting) ("School discipline, like parental discipline, is an integral and important part of training our children to be good citizens—to be better citizens.").

and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503, 507 (1969); *see also Goss*, 419 U.S. at 589-90 (Powell, J., dissenting). The Court has also emphasized that "[a]ssessment of the need for, and the appropriate means of maintaining, school discipline is committed generally to the discretion of school authorities subject to state law." *Ingraham v. Wright*, 430 U.S. 651, 681-82 (1977).

Drug abuse, which the Court has characterized as "one of the most serious problems confronting our society today," *Von Raab*, 489 U.S. at 674, plainly threatens the maintenance of discipline essential to the educational mission. As the Court observed in *T.L.O.*, "[m]aintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems." 469 U.S. at 339 (citations omitted); *see also Goss*, 419 U.S. at 591-92 (Powell, J., dissenting).

The record is replete with evidence that drug use at the Vernonia schools was so pervasive that it led to a complete breakdown of discipline, making the fulfillment of the educational mission impossible. *See* Pet. App. 86a-87a ("[d]isciplinary actions had reached 'epidemic proportions,'" with "an almost three-fold increase in classroom disruptions and disciplinary reports along with the staff's direct observations of students using drugs or glamorizing drug and alcohol use," leading the administration to conclude, at one point, "that the only practical solution was mass expulsion"); *see generally* Pet. App. 80a-81a; 83a-87a. The District unquestionably had a compelling interest in alleviating that problem and restoring an environment in which learning could take place.

2. *The School District Has A Compelling Interest In Preserving The Health And Safety Of Its Students And In Preventing Injury To Student Athletes*

While education is the primary mission of the schools, preserving the "safety of schoolchildren" who are "compel[led] to attend school" is also of paramount importance. *T.L.O.*, 469 U.S. at 353 (Blackmun, J., concurring). Schools have long served a health mission in the community, dating back to the last decade of the nineteenth century, when increasing enrollments began to present a heightened risk of the spread of contagious diseases. *See* Committee on School Health, American Academy of Pediatrics, *School Health: A Guide for Health Professionals, 1987 Revision* 2 (1987).[6]

Schools are often actively involved in the delivery of preventive health care to children.[7] For example, "[m]ost of the 16,000 public school districts in the United States now provide vision and hearing screening and dental and dermatological checks. . . . Others also mandate scoliosis screening at appropriate grade levels." *School Health* at 2. Similarly, "[m]ass immunization programs can be efficiently performed in schools." *Id.* at 156. Such school-based health services are well established and broadly

[6] *See also* Deborah Klein Walker *et al., Children's Health Care and the Schools, in* Mark J. Schlesinger & Leon Eisenberg, eds., *Children in a Changing Health System: Assessments and Proposals for Reform* 265, 265 (1990). Schools have often advanced children's health by performing a "gatekeeping function," *id.* at 285; for example, most States require certain immunizations for school entry. *See id.* at 268 (Table 11.1). The Court has long recognized the legitimacy of state action directed at maintaining health and controlling the spread of contagious disease. *See, e.g., Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (upholding compulsory smallpox vaccinations).

[7] "Because of the concentration of children in schools, there are major potential economies of scale in delivering a wide range of preventive services, including screening for health conditions and health education . . . ." Walker, *Children's Health Care and the Schools, in* Schlesinger & Eisenberg, *Children in a Changing Health System* at 265-66.

accepted, despite the fact that they may involve some degree of intrusion. *See, e.g., id.* at 208 (scoliosis screening requires student's back to be exposed during examination).

The health risks associated with drug use are well established and at least as compelling as the risks associated with other health threats for which schools routinely screen. *See Von Raab*, 489 U.S. at 668 (describing drugs as "one of the greatest problems affecting the health and welfare of our population"). Moreover, drugs present special health hazards for adolescents, including neurological and developmental damage that directly undermines the schools' goal of education. *See* Richard A. Hawley, *The Bumpy Road to Drug-Free Schools*, 72 Phi Delta Kappan 310, 314 (1990) ("Maturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound."). In addition, children are at great risk of developing chemical dependence. *See id.* ("children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor").

Drugs also present unique hazards for athletes. For example, the effects of amphetamines include "[a]n artificially induced heart rate increase, [p]eripheral vascoconstriction, [b]lood pressure increase, and [m]asking of the normal fatigue response," making them "very dangerous drug[s] when used during exercise of any type." Dr. Jerald Hawkins, *Drugs and Other Ingesta: Effects on Athletic Performance, in* Herb Appenzeller, *Managing Sports and Risk Management Strategies* 90, 90-91 (1993). Marijuana can also have dangerous physical effects on athletes, including "[i]rregular blood pressure responses during changes in body position," "[r]eduction in the oxygen-carrying capacity of the blood," and "[i]nhibition of the normal sweating responses resulting in increased body temperature." *Id.* at 94. The "potentially deadly" effects of cocaine include "[v]asoconstriction,

[e]levated blood pressure," and "[p]ossible coronary artery spasms and myocardial infarction." *Id.* at 94. As expert witness Dr. Robert L. DuPont testified,

> cocaine in particular is a risk, not just in terms of playing through pain or not attending to the training that the person has, but also in terms of the heart danger because the athletics itself . . . always raise[s] the heart rate in competitive athletics to high levels. And you add to that the unpredictable effect of cocaine and you have a very dangerous combination.

J.A. 72.

The deleterious impact of drugs on judgment, reaction and coordination, and perception of pain can also have disastrous consequences for athletes. *See* Pet. App. 82a.[8] Dr. DuPont testified that participants in high school and middle school interscholastic athletics who use drugs are at "substantially greater risk" of injury to themselves and to others. J.A. 69.

Specifically, Dr. DuPont testified that drug use "leads people to take risks" and "not to follow instructions to reduce the risks." J.A. 70. Hence, drug impaired athletes are "operating outside of the guidelines that they have learned and, therefore, increase their probability that

[8] In *Schaill v. Tippecanoe County School Corp.*, 864 F.2d 1309 (7th Cir. 1989), the Seventh Circuit, in upholding a drug testing program for student athletes similar to Vernonia's, relied on extensive testimony and factual findings at trial concerning the harm associated with drug use by student athletes:

> Due to alterations of mood, reductions of motor coordination and changes in the perception of pain attributable to drug use, the health and safety of athletes was particularly threatened. At trial, Jacob Burton, the assistant principal and athletic director at McCutcheon High School, testified to three instances in which athletes had admitted that injuries had been caused or exacerbated by drug impairment during athletic contests. In one instance, a baseball player misjudged a pitch and turned toward the ball, suffering a broken nose as a result.

Id. at 1320. *See also* Pet. App. 81a-82a; J.A. 55-56 (testimony of Coach Ronald Svenson).

they're going to have an injury." *Id.*[9] Significantly, an athlete using drugs presents a risk not only to himself, but also to those with whom he is competing. *See id.*[10] Thus, in competitive athletics, as in other situations in which drug testing has been approved by the Court, "even a momentary lapse of attention can have disastrous consequences." *Skinner*, 489 U.S. at 628.

3. *The School District's Testing Program Was Uniquely Effective In Advancing Both Of These Compelling Governmental Interests*

The School District's testing program proved highly effective in ameliorating the substance abuse problems that had plagued Vernonia schools and in restoring discipline so that education could take place, student health be preserved, and needless athletic injuries be prevented. As the court of appeals noted, "[e]very teacher who testified had noticed an improvement in discipline, a reduction in disciplinary referrals, and a decrease in drug use and the glorification of drug culture since the Policy was implemented." Pet. App. 34a. Moreover, Vernonia Athletic Director Marcia King noted a decrease in athletic injuries after the program was implemented. J.A. 43.

[9] Exacerbating this risk to student athletes is the "highly competitive atmosphere" of interscholastic sports, which may discourage an athlete from disclosing injuries. *See* Pet. App. 82a-83a (discussing testimony of Ronald Svenson, a teacher and wrestling coach). As the district court noted, "[t]his sense of pride and desire to stay in the game, when coupled with the numbing influence of drugs, became a significant concern to all involved in the athletic program." *Id.* at 83a.

Moreover, there was concern that a badly injured student athlete requiring emergency medical care might fail to disclose his illicit drug use to medical personnel and thereby risk a potentially life-threatening drug interaction. J.A. 61 (testimony of Ronald Svenson).

[10] For example, athletes using drugs "might use a blocking technique that they were specifically trained was a risk to the other person" or a technique "that would put [themselves] at risk of a head injury or spinal cord injury or some other kind of injury." J.A. 70 (testimony of Dr. Robert L. Dupont).

The reason for the program's success is apparent. Quite simply, Vernonia's program provided students with "a compelling . . . incentive to stop using drugs," *see* Pet. App. 85a, by conditioning participation in interscholastic athletics, which is highly prestigious and much sought-after, on a clean drug test. *See* Andrew J. Miracle, Jr. & C. Roger Rees, *Lessons of the Locker Room: The Myth of School Sports* 108 (1994) ("star athletes . . . may indeed conform to socially acceptable behavior because it is necessary for maintaining athletic involvement"); *id.* ("High school athletes may be forced to conform to school norms by the threat of losing a valued activity . . . .").

The favorable results of the Vernonia program are also consistent with the results of a study of athlete drug testing at the university level. *See generally,* Robert H. Coombs, *Drug Testing As Experienced By Mandatory Participants, in* Robert H. Coombs & Louis Joylon West, eds., *Drug Testing: Issues and Options* 202 (1991). In that study, "[m]ore than half of all respondents (52.8 percent) credited the drug-testing policy as giving them a socially acceptable way to refuse drugs." *Id.* at 210.[11] Presumably, the provision of a socially acceptable excuse for refusing drugs would be even more important at the middle school and high school level, where peer pressure is far more intense and students are making threshold decisions regarding drug use. Indeed, one of the explicit goals set forth in Vernonia's Student Athlete Drug Policy is "providing a legitimate reason for students to say 'no' to drug use." J.A. 7.

Finally, contrary to respondents' suggestion, *see* Opp. 38 n.12, there were no "less intrusive alternatives" which

[11] Moreover, a majority (62.4 percent) of the tested athletes agreed that "mandatory drug testing is an effective way to prevent drug use," and three-quarters (76 percent) agreed that testing "deters some athletes from substance use." *Id.* at 206. Factors such as "team loyalty" and "[f]ear that negative test results will jeopardize current and future opportunities" were important motivations. *Id.* As one athlete put it, "[d]rug testing has forced us to make a commitment to the team and has kept us clean." *Id.*

would have been effective in achieving these results.[12] The School District had already tried a number of alternatives, to no avail. *See* Pet. App. 84a-85a. As Ralph Aultman, principal of the Vernonia grade school, testified,

> We would have kids get suspended. . . . [Disciplinary] referrals were very, very high. There [were] two or three expulsions. We'd try everything in our power from punitive discipline to having our staff work with kids, to bringing in drug dogs and authorities and speakers and like I said, we spent a lot of money trying every resource at our command to stop the problem.

J.A. 25.

Significantly, testing based on individualized suspicion of drug use, an alternative urged by respondents, Opp. 38 n.12, and alluded to by the court of appeals, Pet. App. 59a-60a, would be wholly ineffective. As expert testimony presented below establishes, adolescents' impairment from drug use is often impossible to detect. Dr. DuPont testified that teachers, coaches, and administrators in a high school or middle school would have virtually no ability to determine through observation which students were under the influence of drugs and alcohol, and that "even if they were specifically trained they would miss . . . more than 90 percent of the impairment caused by drugs and alcohol." J.A. 67.

Because of these difficulties, "[t]he only standard [for determining impairment] is the drug test." *Id.* Despite extensive study with other forms of impairment tests, "none of these have proved useful in any setting whatso-

[12] The Court has made clear that the Fourth Amendment does not require government actors to implement the least intrusive alternative, since such a requirement would lead courts to "second-guess" decisions made after careful consideration by governmental bodies. *Skinner,* 489 U.S. at 629 n. 9. Nevertheless, the absence of less intrusive alternatives in this case weighs in favor of the reasonableness of the District's action.

ever as an alternative to the drug test." J.A. 74.[13] Forcing teachers and administrators to make use of such ill-suited tools for detecting drug use would not only be ineffective, it would also further divert energy and attention from the school's primary function—educating students. *Cf. T.L.O.*, 469 U.S. at 353 (Blackmun, J., concurring) ("A teacher's focus is, and should be, on teaching and helping students, rather than on developing evidence against a particular troublemaker.").

B. The Vernonia Testing Program Is Narrowly Tailored And Implemented In A Manner Which Minimizes Intrusion

Requiring a urine sample unquestionably involves some degree of intrusion. Indeed, the Court has noted that "[t]he interference with individual privacy that results from the collection of a urine sample for subsequent chemical analysis could be substantial in some circumstances." *Von Raab*, 489 U.S. at 671. But, as the Court has made clear, the degree of intrusiveness implicated in a specific urine testing situation depends on a number of factors, including the scope and context of the testing, the expectations of privacy of those being tested, and the purpose, design, and consequences of the test itself. *See id.*

[13] As Dr. Dupont testified,

> [T]here has been a very large effort made to find suitable impairment tests. And the basic reasoning for this is to find some kind of a screening test that would be the equivalent of the roadside sobriety test to establish probable cause or a reasonable basis for a drug test. . . . It's a major funding area of the National Institute on Drug Abuse. The simple summary of the report of that work is that, with some interesting exceptions, it has not proven to be of any value. In fact, it actually creates problems when these sorts of tests are introduced, because the tests are not well correlated with drug use or drug-caused impairment; they both under identify drug problems and over identify other problems. So that they end up missing large numbers of people who have drug-caused impairment, and they include people who have no impairment whatsoever in them. They're also extremely subject to subversion.

J.A. 73-74.

at 668-75; *Skinner*, 489 U.S. at 620-21, 624-34. In this case, all of these factors serve to minimize intrusion.

1. *Limiting Drug Testing To Interscholastic Athletes Minimizes Intrusion*

Instead of requiring drug testing of all students, "the Vernonia policy is limited to the one activity which, in that community, is likely to have the greatest impact on the drug and alcohol abuse problem given the documented evidence of incidents involving particular students." Pet. App. 117a. The School District's tailored approach, which was successful in providing a schoolwide resolution of Vernonia's severe drug and alcohol epidemic, was appropriate and effective for a number of reasons.[14]

First, the record establishes that substance abuse was widespread in the schools' interscholastic athletic programs. The involvement of adolescent athletes in drug and alcohol abuse is not unusual.[15] Concentrating drug eradication efforts on interscholastic athletes makes sense given the fact that such athletes are consistently placed in positions in which their drug usage poses particularly severe hazards to themselves and to others on the field. *See* pp. 11-13, *supra*. Moreover, the nature of the athletic competition itself provides student athletes with an incentive to use drugs in the hopes of enhancing their performance or to dull pain so that they can continue playing. As Vernonia Superintendent Ellis Mason testified, "student athletes have reasons to take drugs which other students don't"; for example, they may use drugs to "get pumped up for a game, play with pain or eliminate pain so they could play." J.A. 84.

[14] No equal protection challenge based on the differential treatment of athletes and nonathletes is presented here. Based on the factors discussed below which justify such differential treatment, however, it is clear that such a challenge would fail.

[15] As one researcher studying adolescent drug use concluded, "athletes do use drugs, and . . . participation in athletics and drugs go hand in hand." M.F. Stuck, *Adolescent Worlds: Drug Use and Athletic Activity* 64 (1990).

In research on adolescent drug use conducted by M.F. Stuck, "[a]thletes who used marijuana gave a reason related to sports performance. It was their belief that being high while engaged in sports enhanced performance in some way or another." M.F. Stuck, *Adolescent Worlds: Drug Use and Athletic Activity* 79-80 (1990) (footnote omitted). For example, one student athlete explained his marijuana use as follows: "I love playing sports when I'm high . . . . I have more energy, I can concentrate more." *Id.* at 81. Similarly, a student participating in track stated that he used speed "[c]ause it helped me run. It kept me going . . . I can run farther." *Id.* at 73; *see id.* at 81; Dr. Jerald Hawkins, *Drugs and Other Ingesta: Effects on Athletic Performance, in* Herb Appenzeller, *Managing Sports and Risk Management Strategies* 90 (1993) ("amphetamines are generally used by athletes to produce a feeling of stimulation or 'being up' to attempt to delay fatigue or to increase aggression"). Other athletes reported taking "codeine in order to be able to continue playing while injured." Stuck, *Adolescent Worlds* at 81. Thus, "sport for some . . . may be the very reason for use of certain drugs." *Id.*; *see* Andrew W. Miracle, Jr., and C. Roger Rees, *Lessons of the Locker Room: The Myth of School Sports* 112-13 (1994).

Moreover, the record reflects that Vernonia athletes were the ringleaders in drug and alcohol abuse, and that their substance abuse threatened "a significant poisoning impact on the broader student population." *See* Pet. App. 83a-84a. As Dr. DuPont explained, the behavior of "leaders" among the peer group—those "at the top of th[e] status hierarchy"—"play[s] a very powerful role in terms of shaping the behavior of large numbers of students in the classes." J.A. 68. Thus, "what they do about drugs makes an enormous difference about what other kids are going to do." *Id.*

In Vernonia, athletes are the primary peer leaders whose behavior other students seek to copy. *See* Pet. App. 116a. This is typical of American schools, in which

"[g]roups are formed and prestige is bestowed largely on the basis of sport. Traditionally athletes have occupied positions of higher status in American schools than those who excelled in academics, art, music, or any other skill area." Miracle & Rees, *Lessons of the Locker Room* at 224.[16] The use and glorification of drugs by Vernonia's student athletes thus presented a significant threat to the student body as a whole by reinforcing the growing glorification of drugs in society at large.[17] The School District reasonably concluded that reducing drug use among athletes would have a positive spillover effect on other Vernonia students who seek to emulate their behavior. *See* Pet. App. 116a.

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[16] In 1961, James S. Coleman published groundbreaking research indicating that high school athletes are given paramount status by their peers, that star athletes are highly visible and readily identifiable, and that their behavior is emulated by younger students. *See generally* James S. Coleman, *The Adolescent Society: The Social Life of the Teenager and Its Impact on Education* (1961); *see id.* at 147 ("Overall, it appears that athletic stardom stands highest as a symbol of success, as an achievement to channel the energies of the naive freshman, as a means of entry into the leading crowd, as a way to gain popularity with girls, and as the man with most friends."); *id.* at 301 ("The boys who 'stand out' most among the upperclassmen are athletes; they are the only models [an incoming freshman] has to emulate in his early and impressionable weeks in high school."). Coleman's research has been replicated several times. *See* Wilbert Marcellus Leonard II, *A Sociological Perspective of Sport* 319-21 (4th ed. 1993). *Cf.* Miracle & Rees, *Lessons of the Locker Room* at 103 ("[y]oung athletes become role models for the community and the country").

[17] *See, e.g.*, Janofsky, "Drug Use Rising Among Teen-Agers, Study Says" *New York Times*, Dec. 13, 1994, at A1 (increased drug use by teenagers "attributed to 'glamorizing' of drugs by the entertainment industry"); John Leland, "Just Say Maybe," *Newsweek*, Nov. 1, 1993, at 51 ("What is clear, and arresting, is the rise of a popular culture that actively glorifies drug use. There is a sea change in attitudes, if not in actual use: an emerging population that openly espouses that drugs—at least some drugs—are no big deal.").

2. *Interscholastic Athletes, By Virtue Of Their Participation In A Pervasively Monitored Activity, Have A Diminished Expectation Of Privacy*

Also relevant to the intrusiveness inquiry is whether the search takes place within the context of an activity or industry that has been pervasively regulated. Participants in such activities have a reduced expectation of privacy by virtue of the preexisting regulation. In *Skinner*, for example, the Court found that "the expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees." 489 U.S. at 627. Thus, while the Court recognized that "some of the privacy interests implicated by the toxicological testing at issue reasonably might be viewed as significant in other contexts, logic and history show that a diminished expectation of privacy attaches to information relating to the physical condition of covered employees and to this reasonable means of procuring such information." *Id.* at 628. *See also Von Raab*, 489 U.S. at 671 ("certain forms of public employment may diminish privacy expectations" such as those demanding "intrusive inquiries into [employees'] physical fitness").

Like the railroad employees in *Skinner* who "ha[d] long been a principal focus of regulatory concern," 489 U.S. at 628, student athletes are subject to numerous rules and requirements. *See Schaill*, 864 F.2d at 1318-19. Much of this monitoring stems from the inherent risks associated with the athletic activity. Injuries are common in middle and high school interscholastic sports: "The National Athletic Trainers' Association (NATA) estimates the injury total to be about 1.3 million per year" for high school football players, basketball players, and wrestlers. Miracle & Rees, *Lessons of the Locker Room* at 110 (footnote omitted). Moreover, instances of young athletes dying from sudden heart failure occur with alarming frequency. *See* William C. Rhoden, "Deaths of Youthful Athletes Raise Questions Over Testing," *New*

York Times, March 14, 1994 at A1, C4 col. 2-3 (the deaths of 133 high school athletes since the 1981-82 school year were " 'non-injury related,' mostly the result of heart problems") (quoting Dr. Fred Mueller)). Indeed, "heart problems are the most common cause of death among high school athletes." *Id.* at C4 col. 2.

In an effort to reduce these risks, state associations, school districts, and individual schools and athletic departments have adopted a wide range of measures aimed at monitoring and preserving the health and well-being of student athletes. The most fundamental and ubiquitous of these measures is the physical examination, which the Vernonia School District, like most other schools in the country, requires its interscholastic athletes to undergo.[18] *See* Pet. App. 94a; Pl. Ex. 2 at 30 ¶ 1 (Vernonia Policy for Interscholastic Eligibility and Competition). The Court has viewed the requirement of a physical examination as indicative of a diminished expectation of privacy with respect to drug testing. *See Skinner*, 489 U.S. at 627; *see also Von Raab*, 489 U.S. at 677 (listing "medical examinations" as one of the "intrusions that may be expected to diminish [employees'] expectations of privacy in respect of a urinalysis test").

Significantly, the physical exam required by Vernonia, and submitted to by James Acton, included the collection and medical analysis of a urine sample. *See* Pet. App.

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[18] The National Federation of State High School Associations recommends a physical examination before the first year of competition and annual parental consent. *See* Rhoden, "Deaths of Youthful Athletes," *New York Times*, March 14, 1994 at C4, col. 5. Sixteen state associations follow this recommendation, while an additional twenty-six state associations require a physical examination prior to each year of competition, as well as annual parental consent. William C. Rhoden, "Athletes At Risk Too Often," *New York Times*, Dec. 11, 1993 at 31. The well-publicized deaths of a number of high school athletes have spawned efforts to require more extensive and frequent physical examinations for interscholastic participation. *See id.*; Rhoden, "Deaths of Youthful Athletes," *New York Times*, March 14, 1994 at C4 col. 4.

94a n.2; J.A. 17-18. The fact that athletes are already required to give a urine sample as part of the physical exam, for reasons unrelated to drug testing, further suggests a diminished expectation of privacy with respect to the drug test itself. *See Schaill,* 864 F.2d at 1318.[19]

To further reduce risk to student athletes, detailed procedures are typically established for injuries and other emergencies, *see* Appenzeller, *Managing Sports* at 104-07, and the safety and well-being of student athletes is monitored on a continuing basis by coaches and, in many cases, team physicians. *See* Irvin A. Keller & Charles E. Forsythe, *Administration of High School Athletics* 293-97 (7th ed. 1984); Appenzeller, *Managing Sports* at 103. For example, athletes are individually fitted with protective equipment containing appropriate warning labels, and this equipment is periodically inspected. *Id.* at 153-54; Keller & Forsythe, *Administration of High School Athletics* at 280-81. In addition, student athletes are required to submit signed parental consent forms which discuss the risks of participation. *See* Pl. Ex. 2 at 30 ¶ 1 (Vernonia Policy for Interscholastic Eligibility and Competition); *see also* note 18, *supra* (annual parental consent required for participation by 42 state associations).

Student athletes are also required to abide by training rules established by the coach as well as policies established by the school. *See generally* Pl. Ex. 2 at 30 (Vernonia Policy for Interscholastic Eligibility and Competition) (listing school policies for interscholastic eligibility and competition, including policies regarding academic performance and class attendance); *id.* at ¶ 8 ("[t]he athlete will comply with the rules of conduct, dress, training

[19] Other features of interscholastic athletic competition also support the view that athletes have a diminished expectation of privacy. For example, as the district court noted, the "locker rooms themselves are open spaces and do not provide a great deal of privacy when students shower and change." Pet. App. 117a-18a; *see also Schaill,* 864 F.2d at 1318 ("[t]here is an element of 'communal undress' inherent in athletic participation, which suggests reduced expectations of privacy").

hours and related matters as may be established for each sport"); *see also* Stuck, *Adolescent Worlds* at 19 ("athletes' off-the-field behavior is traditionally and typically regulated by 'training rules' ") (citation omitted). Even such matters as transportation to and from games are closely regulated. *See* Pl. Ex. 2 at 30 ¶ 6 (Vernonia Policy for Interscholastic Eligibility and Competition).

Moreover, athletics as a whole has been pervasively regulated to prevent individual athletes from gaining an unfair advantage. For decades, drug testing has been conducted in athletics to deter and detect the use of performance-enhancing drugs. *See generally* Eric D. Zemper, *Drug Testing in Athletics, in* Coombs & West, *Drug Testing* 113; *see also Schaill,* 864 F.2d at 1319 (discussing "high visibility and pervasiveness of drug testing in professional and collegiate athletics in this country and in the Olympic Games").

3. *The Setting, Procedure, Purpose, And Consequences Of The Test Minimize Intrusion*

In addition, a number of other features of the Vernonia testing program serve to minimize its intrusion. First, the test is conducted in a school setting, a setting in which students typically feel comfortable. *Cf.* Walker, *Children's Health Care and the Schools, in* Schlesinger & Eisenberg, *Children in a Changing Health System* at 266 ("[S]chools can more effectively address some health needs of children and youth because they provide environments in which students feel comfortable. Schools are a better and less intimidating environment than physician offices or hospitals for offering health education and counseling."); *T.L.O.*, 469 U.S. at 348-50 (Powell, J., concurring) (discussing cooperative nature of the teacher-student relationship).

In addition, students are advised of the details of the testing program prior to their participation in interscholastic athletics. *See* J.A. 7-11 (Student Athlete Drug Policy). Such advance notice reduces anxiety and "signifi-

cantly diminishes the subjective intrusiveness" associated with the testing process. *Schaill*, 864 F.2d at 1320; *cf. United States v. Biswell*, 406 U.S. 311, 316 (1972); *New York v. Burger*, 482 U.S. 691, 711 (1987). While the random testing program does not permit a given student to know in advance the days on which he will be tested,[20] or the number of times during the season he will be tested,[21] he is advised of the procedures for random selection, which are routinized and discretionless. *See* J.A. 8 (Student Athlete Drug Policy); Pet. App. 36a-37a; *id.* at 88a-89a.[22]

The School District's procedure for the collection of urine samples does not materially differ from the procedures approved by this Court in *Skinner* and *Von Raab*, and by the Seventh Circuit in *Schaill*. Here, as in those cases, the monitor does not view the act of urination, nor is the student's body exposed to the monitor. *See* Pet. App. 89a-90a; J.A. 28 (testimony of Ralph Aultman). The monitor is seated 12 to 15 feet away while the sample

[20] The unpredictability of test dates is itself essential to the integrity of the testing program. *See* Coombs, *Drug Testing As Experienced By Mandatory Participants, in* Coombs & West, *Drug Testing* at 204-05, 207 (discussing the various techniques used to thwart drug testing programs with predictable test dates); *cf. Burger*, 482 U.S. at 710 ("Because stolen cars and parts often pass quickly through an automobile junkyard, 'frequent,' and 'unannounced' inspections are necessary in order to detect them. In sum, surprise is crucial if the regulatory scheme aimed at remedying this major social problem is to function at all.").

[21] The fact that a given student may be randomly selected many times during the school year, or may be tested only at the outset of the season, does not detract from the program's validity. The Court rejected an analogous argument in *Burger*. *See* 482 U.S. at 711 n.21.

[22] No dispute has been raised concerning the fairness of the process for random testing. *See* Pet. App. 36a. In addition, because the samples are screened only for a discrete set of substances, *see* Pet. App. 122a, no issue concerning additional medical or personal facts that might be learned from the urine sample is presented.

is produced, and the monitor checks the temperature of the sample after it is collected. Pet. App. 90a. While the collection of urine samples is therefore subject to limited monitoring to prevent tampering or substitution of another person's urine, *see* Coombs, *Drug Testing As Experienced By Mandatory Participants, in* Coombs & West, *Drug Testing* at 204, the intrusion is minimized.

Finally, the intrusion is minimized by the fact that the consequences of refusing or failing a drug test are nonpunitive. Positive test results "are not disclosed to criminal authorities and may not be used as the basis for school disciplinary proceedings such as suspension or expulsions." Pet. App. 121a-22a. The sole impact of refusing or failing the drug test is on a student's eligibility to participate in interscholastic athletics, a purely voluntary extracurricular activity which, as discussed above, is already pervasively regulated.[23]

C. The Compelling Interests Served By The Program Far Outweigh The Intrusion On Fourth Amendment Interests

When the compelling interests served by the drug testing program are balanced against the intrusion the testing requires, it is clear that the testing is not an "unreasonable search or seizure" under the Fourth Amendment. The court of appeals' contrary conclusion is attributable in part to its failure to recognize factors present in this case

[23] *See Schaill*, 864 F.2d at 1319 & n.11. The court of appeals attempts to underplay the voluntary nature of interscholastic athletics by referencing the developmental and educational benefits of physical activity. Pet. App. 55a-56a. But the School District offers all of its students these benefits through its physical education program, which is provided as part of the regular curriculum and for which no drug test is required. While it may be true that interscholastic athletics are "part of what tax dollars pay for," *id.* at 55a, this does not mean that students participate in interscholastic athletics as of right. Student athletes are subject to a wide range of training rules and school policies, and may be excluded from participation for noncompliance. *See Schaill*, 864 F.2d at 1318-19 & n.9 (collecting cases).

which diminish the degree of intrusion and its disregard of the fact that students who choose to participate in interscholastic sports are subject to pervasive regulation associated with that activity which diminishes their expectation of privacy.

Perhaps most important to the court of appeals' conclusion, however, was its erroneous view that suspicionless testing may only be implemented where there is a risk of a dramatic, discrete mass disaster. The court of appeals indicated that such testing could be justified only by "some additional horrible element, some terrible threat to safety that can flow from the presence of drugs—some shooting, some explosion, some crash of train, truck, or aircraft, or some breach of top secret national security." Pet. App. 58a.

This analysis is flawed for two reasons. First, it ignores the very severe risks that can and do flow from drug use by athletes. Sudden death and severe injury are all too common occurrences in middle school and high school athletics, *see* pp. 20-21, *supra*, and the presence of drugs substantially increases the risk of such events occurring. *See* pp. 11-13, *supra*. This, *amici* submit, should unquestionably qualify as a "terrible threat to safety" under the court of appeals' approach.

Second, and more fundamentally, the court of appeals' approach fails to recognize that it is not only the *magnitude* of a threatened harm that is relevant to the balancing test, but also the *probability* of that harm occurring, absent government action.[24] For example, a very low prob-

[24] Consideration of the probability of a harm's occurrence, as well as the severity of the harm, has been incorporated into reasonableness inquiries in a number of contexts, most notably by Judge Learned Hand. *See United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (Hand, J.) (whether a defendant has acted reasonably depends both on the gravity of the injury and the probability of its occurrence); *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950) (Hand, J.) ("In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary

ability of a particular harm occurring may be sufficient to justify governmental action where the magnitude of the harm is very great. In *Von Raab*, the Court permitted suspicionless testing on a record which evidenced a relatively low chance of certain potential harms occurring, based on its assessment of the magnitude of those harms. *See* 489 U.S. at 673-75 & n.3.[25]

Here, in contrast, the harms which the School District sought to prevent through its drug testing program—injury to athletes, and a deterioration of school discipline so severe as to make the education of students impossible—were already occurring when the District took action. In this case, there was ample evidence that a substance abuse epidemic of serious proportions existed in the Vernonia schools, that it was particularly concentrated in the interscholastic athletic programs, that discipline had drastically deteriorated, and that drug-related injuries had occurred.

Thus, even if the inability of an entire school to educate and protect its students is viewed as a disaster of lesser dimensions than a shooting or a crash, it is quite significant that the former disaster was already in progress at Vernonia when the School District took action. The Court's opinions should not be read to permit suspicionless testing where a small chance of a somewhat more dramatic disaster exists, and not to permit such testing where a somewhat less dramatic disaster is already underway. To draw such distinctions runs contrary to

to avoid the danger."), *aff'd*, 341 U.S. 494 (1951). The relevance of Hand's analysis to Fourth Amendment reasonableness has been noted. *See* Richard A. Posner, *Economic Analysis of Law* § 29.1 at 640 (3d ed. 1986) (applying Hand formula to Fourth Amendment reasonableness inquiry).

[25] There was no evidence of a drug problem among Customs employees prior to drug testing, and drug testing failed to reveal a drug problem. *See id.* at 673. Moreover, the government had not demonstrated *"even a single instance* in which any of the speculated horribles actually occurred." *Id.* at 683 (Scalia, J., dissenting) (emphasis in original).

the balancing idea that is central to the reasonableness determination.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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January 12, 1995